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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 416, 417 and 418

WILLIAM T. BURTON, JOE T. CAWTHORN, AND MARCEL F. LABRANCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2191-2199) is reported at 175 F. 2d 960. The dissenting opinion by Circuit Judge Hutcheson (R. 2273-2277) on motions for rehearing, is reported at 176 F. 2d 865.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1949 (R. 2200) and petitions for rehearing were denied on September 23, 1949 (R.

2278). The petitions for writs of certiorari were filed on October 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiring to tamper with a jury, where the prosecution proved by the testimony of one member of the jury in question that another juror, one of the alleged co-conspirators, voted throughout the jury deliberations for acquittal, the trial judge erred in refusing to permit the defense to cross-examine the witness as to how the other jurors finally voted.

2. Whether, after defense counsel were allowed to examine a prior statement by a government witness and his testimony before the grand jury before cross-examining him, it was improper for the court to exclude such documents, later offered for the purpose of impeachment and as showing bias.

3. Whether the giving of the so-called *Allen* instruction, after the jury was unable to agree for twenty-five hours, and two days before the jury returned a verdict, was an illegal coercion of the jury verdict.

4. Whether the indictment was duplicitous for charging a conspiracy to obstruct the administration of justice and to defraud the United States of its right to an honest and unbiased jury.

5. Whether the only charge and evidence against petitioner LaBranche was with respect to the substantive offense of bribery so that he could not be guilty of conspiracy.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U.S.C. [1940 ed.] 88) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 135 of the Criminal Code (18 U.S.C. [1940 ed.] 241) provided in pertinent part:

> Whoever corruptly * * * shall endeavor to influence, intimidate, or impede any witness, in any court of the United States * * *, or any grand or petit juror * * * of any court of the United States, * * * or who corruptly * * * shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.[1]

[1] The maximum fine and prison term imposable under this section were increased to $5,000 and five years, respectively, by the Act of June 8, 1945, c. 178, § 1, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case.

Section 136 of the Criminal Code (18 U.S.C. [1940 ed.] 242) provided in pertinent part:

> If two or more persons conspire * * * to influence the verdict * * * of any * * * petit juror in any such court [*i.e.*, of the United States], * * * each of such persons shall be fined not more than $5,000, or imprisoned not more than six years, or both.[2]

STATEMENT

On January 3, 1946, a single-count indictment (R. 3-11) was filed in the United States District Court for the Eastern District of Louisiana. It charged the petitioners, William Burton, Joe Cawthorn, and Marcel LaBranche, together with James Noe, a codefendant, with having conspired with one another and with three others not indicted, Edwin Oliveira, Bernard Hughes, and John Astorias, "to commit offenses against the United States," namely, "corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a certain criminal trial, held in June 1945 in the same federal district court, in which the petitioner Burton had been charged with income tax evasion, and "to de-

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[2] This section was amended, by the Act of June 8, 1945, c. 178, § 3, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case, to read, in pertinent part:

"If two or more persons conspire to violate any provision of section 135 * * * of the Criminal Code, as amended, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished in like manner as provided by [that section]."

fraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax case] through the petit jury * * * free from corruption, improper influence and fraud, by virtue of the personal and pecuniary interest of the petit jurors in the success of the defendant in the said criminal prosecution" (R. 4-5), in violation of Section 37 of the Criminal Code, (*supra*, p. 3).

Petitioner Burton was the principal figure involved, and the evidence showed one general conspiracy to effect his acquittal at his tax evasion trial, which lasted from June 4 to June 27, 1945 (R. 358, 1499-1500). The efforts of all the co-conspirators were directed to the achievement of this result.

The defendant Noe was a former Governor of Louisiana (R. 874) and a good friend of Burton (R. 1365). Knowing that Fred Dinghaus was a member of the petit jury panel for the trial of Burton's case (R. 453), Noe asked him in a conversation two or three weeks before the trial if he was on the jury. When Dinghaus replied that he was, Noe said, "Well, Burton is a good friend of mine; he is nothing but a country yap * * * and knows nothing about office work or bookkeeping." After Dinghaus answered that this did not make any difference because he would find a defendant guilty or not by giving him a fair trial according to what the evidence was, Noe said, "Well, I am sure that's all Mr. Burton would want." (R. 455, 456). Three

or four weeks after the Burton case ended in a mistrial, Noe summoned Dinghaus to his office and "thanked" him "for the outcome of the Burton case" (R. 457). Dinghaus demurred, saying, "I don't know whether or not you know how I voted." Noe replied, "Regardless of how you voted, I want to thank you anyway." (*Ibid.*)

The alleged co-conspirator Hughes, an insurance man, approached Henry Groffman, also an insurance man, in May 1945, after learning that Groffman was on the jury panel for Burton's trial. As a ruse to meet Groffman, Hughes stated he had an insurance prospect who was overweight and might get a better rate with one of Groffman's companies. (R. 449-451.) Immediately after their meeting began, Hughes mentioned the fact that Groffman was on the jury and stated that Burton was "the finest man in the world, but ignorant of bookkeeping and income taxes." He also asked Groffman several times to do "the right thing" for Burton. (R. 450.) Groffman, however, was subsequently excused from service on the Burton jury (R. 451). Supplementary evidence, tending to explain Hughes' interest in helping Burton to get acquitted, was as follows: Hughes had been foreman of a petit jury which had acquitted the alleged co-conspirator Noe in a tax evasion trial in 1942 (R. 450, 877); Noe thereafter purchased substantial amounts of insurance through Hughes as broker (R. 363-364, 371, 376, 380; Gov. Exs. 7 and 14, R. 1503, 1514); up to about the time of Burton's tax evasion trial, Noe owed

Hughes substantial sums in connection with these insurance transactions (R. 427-428, 432-433, 959; Gov. Ex. 48, R. 1589; Noe-Ervin Ex. 14, R. 1828-1829); Noe paid these debts at about the time of the commencement of Burton's tax trial (R. 407; Gov. Exs. 37 and 40, R. 1580-1581, 1584); the payment was made possible by Noe's obtaining funds from Burton (R. 399-400, 435-436, 998; Gov. Ex. 43, R. 1586).

Around the latter part of May or the first part of June, 1945, Hughes Walmsley, who knew both Noe and petitioner Cawthorn (R. 464), met them at his office at Noe's suggestion. Either Noe or Cawthorn, who was Burton's trial counsel in the tax fraud case (R. 1165-1167), showed Walmsley a list of the prospective jurors, and asked if he knew any of them (R. 465). After indicating he knew about ten of the jurors, Walmsley was asked by either Noe or Cawthorn if he knew any of them well enough to talk to them, to which Walmsley answered, "No" (R. 466). Noe and Cawthorn told Walmsley that it would be to his interest if he could help them in the matter of talking to the jurors, but he said he was not interested (R. 467). Later, about June 19, 1945, during the course of the Burton trial, Noe told Walmsley it would be to his benefit if he could help in the matter they discussed at the latter's office (R. 467). Also during the Burton trial, Cawthorn told Walmsley, in the lobby of the Roosevelt Hotel in New Orleans, that he could make $1,000 if he would "talk to those fel-

lows," but Walmsley declined, saying he was not interested (R. 468-469). On a second occasion during the trial, in the same hotel lobby, Cawthorn asked Walmsley if he would talk to any of "those people," but was told, "No." (R. 470.) On a third occasion in this hotel lobby, during the early part of June 1945, Burton himself spoke to Walmsley about his lack of bookkeeping knowledge and complained that the Government was taking unfair advantage of him (R. 471). Walmsley did not contact any of the jurors either prior to or during the trial (R. 471).

Oliveira and his "good friend", petitioner LaBranche, were both members of the jury panel selected for the Burton trial (R. 557, 558, 559). On or about June 4, 1945,[3] Oliveira and LaBranche, having heard a rumor that "there would be plenty [of] money put out for the jury," agreed that if either of them should be chosen to serve on the jury, they would divide any money received by the one selected. Oliveira was excused by the Government from jury service, but LaBranche served. (R. 558-559.) That evening the two men met at the "Town Club" in New Orleans, where Oliveira said he would make "the necessary contacts" for getting "some money" (R. 559-560). Later, Oliveira met petitioner Cawthorn on the street. Caw-

[3] All dates referred to in Oliveira's testimony are approximate only. Oliveira testified that he could not possibly remember the exact dates of his meetings and conversations with LaBranche, Cawthorn, and Burton (R. 567, 571, 575, 577, 580, 584, etc.).

thorn told Oliveira he was sorry the latter did not "get on the jury," but asked if he had any "good friend" on it. Oliveira mentioned LaBranche, and Cawthorn inquired whether LaBranche could be trusted and whether he would be interested in "making some money." Oliveira said he would have to discuss the matter with LaBranche. Cawthorn admonished Oliveira to "be careful, because you are dealing with the Government. It is a serious matter." (R. 561, 562.) When Oliveira next saw LaBranche, LaBranche at first seemed not interested, but finally told Oliveira to "see what you can do" about "getting some money" (R. 562-563). Thereafter, Cawthorn and Oliveira again met on the street. Cawthorn told Oliveira to inform LaBranche that there "will be a thousand dollars for him and five hundred for you if he votes favorably in the acquittal of Mr. Burton." (R. 563.) This agreement had been approved by Burton (R. 566). When Oliveira conveyed this message to LaBranche, LaBranche expressed concern at the chances he and Oliveira were taking, and it was decided that Oliveira should see Cawthorn again in an effort to get "a larger amount of money" (R. 563, 564.) Later, Cawthorn met Oliveira in the St. Charles Hotel lobby (R. 566), where Cawthorn told Oliveira to meet him in a certain room in the hotel. Oliveira there reported to Cawthorn that LaBranche "wasn't satisfied." Cawthorn told Oliveira to "go back and tell LaBranche not to worry about that money— * * * that we all

would get more money after the trial was over; that Burton was a good fellow." (R. 567-568.) At about the middle of the trial one night in the Roosevelt Hotel, Burton personally confirmed Oliveira's understanding, reached with Cawthorn, that LaBranche was to receive $1,000 and Oliveira $500 (R. 568, 569).

On the evening of the day on which the trial ended (R. 569), Oliveira asked Burton about the money, and Burton advised him that he would get the $1,500 in a package from the alleged co-conspirator Astorias, the Roosevelt Hotel chef, on the following morning (R. 570). When Oliveira asked Astorias for the package, Astorias said he knew "Mr. Burton very well, but he didn't leave any package" (R. 571). When Oliveira imparted this advice to LaBranche, the latter lamented, "It looks like we're blowed up—that we ain't going to get anything" (R. 572). However, about two weeks after the trial, LaBranche did receive from Astorias a package containing $1,500, which Burton had left with Astorias to be turned over to LaBranche (R. 573, 650). Oliveira and LaBranche divided the money at the Monteleone Hotel (R. 573). Some two to four weeks later, Burton thanked Astorias "for giving the man the package, it worried the hell out of me" (R. 651).

The Government also showed that on or about May 24, 1945, eleven days before the commencement of his tax evasion trial on June 4th, petitioner Burton drew $70,000 from his personal account in

a Lake Charles, Louisiana bank (R. 1411-1412; Gov. Ex. 65, R. 1605). Burton admitted drawing out this money (R. 1411) and described it as his "fighting fund" (R. 1415).

At Burton's tax evasion trial, LaBranche voted for Burton's acquittal during the entire course of the deliberations (R. 545). That prosecution resulted in a mistrial because of failure of the jury to agree (R. 358, 1499-1500).

The jury in the instant trial acquitted Noe, but found petitioners Burton, Cawthorn and LaBranche guilty (R. 287). Each of the petitioners was sentenced to two years' imprisonment and to a fine of $10,000 (R. 2165, 2166-2167, 2167-2168). On appeal to the Court of Appeals for the Fifth Circuit, the judgments of conviction were affirmed (R. 2200). Petitions for rehearing were thereafter denied (R. 2278), one judge (Hutcheson, J.) dissenting, expressing the view that the convictions should be reversed and a new trial granted, on the sole ground that the trial court committed prejudicial error in limiting the cross-examination of a certain prosecution witness, a juror in the Burton trial (R. 2273-2277), as to which see pp. 11-23, *infra*.

ARGUMENT

1. Leon Adams, one of the jurors in the Burton tax evasion prosecution, was a government witness in the instant conspiracy case (R. 544). On direct examination, he testified, without objection, that petitioner LaBranche, one of his fellow jurors in

the tax evasion case, voted for Burton's acquittal "[d]uring the entire course of the deliberations" (R. 544-545). The obvious purpose of the Government in eliciting this testimony was, of course, to corroborate so much of the Government's other evidence (see pp. 8-11, *supra*) as tended to show a conspiracy on the part of petitioners to purchase LaBranche's favorable vote as a juror in the tax evasion prosecution. On cross-examination, Adams was asked "how many other [jurors] voted for not guilty?" (R. 545.) Government counsel objected on the ground that it was "entirely irrelevant and immaterial" how other jurors voted (*ibid.*).

Argument on the question of the propriety of this line of cross-examination was then had outside the presence of the jury (R. 546-554). The essence of defense counsel's argument in support of the legitimacy of the challenged question was as follows (R. 550):

> * * * This witness [Adams] is presented by the Government. * * * he is asked a question, how did a particular man vote? Well, I would think it would be absolutely elementary that on cross-examination this witness' *memory can be tested,* his credibility can be tested and he can be asked, individually, the names of every one of those men *to determine whether or not he remembers how everybody else voted.* * * * [italics added]

The trial judge countered that "you can't test the credibility of a witness on a collateral matter" (R.

551), to which defense counsel replied, "You can't contradict a witness on a collateral matter, but you certainly *can test his credibility* on a collateral matter" [italics added] (*ibid.*). Further exchanges between the trial judge and defense counsel in this colloquy likewise indicate that the point at issue between them was the propriety or impropriety of the question which occasioned the colloquy as a cross-examination device for exploring the matter of the witness Adams' *memory and credibility* in respect of his direct testimony that LaBranche had voted for Burton's acquittal throughout the jury's deliberations (see R. 551-552).

At the conclusion of the colloquy, the trial judge announced his decision in these terms (R. 552-553):

> * * * you can't test his credibility on a collateral matter. I am convinced * * * that it is entirely irrelevant * * * how other jurors voted in this proceeding. * * * It is certainly not the purpose of the Court to shut off any cross-examination that the Court considers proper. I simply intend to rule * * * that I take it it will be improper to ask the witness how the balance of the jury voted in this case. * * * that is the only restriction I am placing on the cross-examination.

The jury was then recalled and the cross-examination of Adams resumed. Defense counsel was permitted to ask the witness if he remembered how each of eight other named jurors voted, "without saying how he voted," and the answer was in the

affirmative in each instance (R. 555). The judge also permitted the following question (*ibid.*): "Do you remember whether or not any of those men, without naming them or saying how they voted, took one position at the first ballot and didn't change throughout?" The reply, not entirely responsive, was (R. 556): "There were some changes. There were changes during the deliberations from the original ballot. * * * There were certain ones that might have changed—that did change." This reply evidently satisfied defense counsel, as no further questions were asked the witness.

The dissenting judge below based his dissent solely on his belief that the trial judge erred in refusing to permit the witness Adams to be cross-examined as to how many jurors other than LaBranche voted for Burton's acquittal. He said (R. 2275-2276):

> It is and was the contention of the defendants that had the juror [Adams] been permitted to testify as to how each juror voted, his testimony would have shown that some of them voted for acquittal, some for conviction, and that when the jury was discharged, eight were for acquittal and four were for conviction. Their cross examination limited on the wholly untenable theory that how the other jurors voted was immaterial, defendants, compelled to have the issue go to the jury on the evidence that LaBranche had voted throughout for acquittal, were deprived of their right to show that others had voted for acquittal too * * *.

Petitioners now adopt this argument (Burton Pet. 8-15; Cawthorn Pet. 18-21; LaBranche Pet. 20-24). Thus, petitioner Burton argues (Pet. 12) that "As a result of the trial court's action * * * the defendants were prevented from showing that numerous other members of the jury in the income tax case had voted for acquittal." And see Cawthorn Pet. 20; LaBranche Pet. 20-21. As we have pointed out, however (*supra,* pp. 11-13), the sole articulated point of dispute between defense counsel and the trial judge during the colloquy concerning the propriety of the controverted question sought to be asked Adams was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect of his direct testimony that the juror LaBranche had voted for acquittal throughout the jury's deliberations.[4]

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[4] It is true that in one isolated passage during the colloquy, which extended over some nine pages of the printed record (R. 546-554), defense counsel remarked that "it would be most unfair to have it appear here now that LaBranche was the only one that voted that way" (R. 552). Whatever merit this point might have had, however, it was articulated at no other time during the colloquy, and it is manifest from a reading of the colloquy as a whole that it was never brought home to the trial judge as possibly a sound basis for the admissibility of the controverted line of questioning, distinct from its asserted relevancy as a test of the witness' memory and credibility. Cf. *Johnson* v. *United States,* 318 U. S. 189, 199-201.

The only other record reference supplied by petitioners (see Burton Pet. 12) as evidence of their reliance at the trial on the now-asserted claim that the disputed line of questioning was relevant to show that other jurors than LaBranche also voted for Burton's acquittal is R. 2142, where defense counsel stated: "* * * we proposed to show, as a matter of fact, the jury was eight to four for acquittal * * *." This, however, occurred long after the trial in connection with argu-

But apart from petitioners' tardiness in articulating this contention, we submit that it is without merit. Their reliance on *Clark* v. *United States*, 289 U. S. 1, 12-19, is misplaced. That case involved a prosecution for contempt of court by one Mrs. Clark, the charge being that she, a prospective juror in the trial of one Foshay for mail fraud, wilfully concealed at her *voir dire* examination the fact that she had formerly been employed by a company headed by Foshay and had other reasons to be biased in Foshay's favor, and wilfully and falsely swore to lack of bias with respect to Foshay. At the trial on the contempt charge, the Government adduced evidence to show Mrs. Clark's bias in favor of Foshay (and consequently the false and misleading nature of her answers on the *voir dire*), and also showed that during the jury deliberations in the Foshay trial (which resulted in a mistrial by virtue of a hung jury, 11 jurors having been for conviction and one for acquittal) Mrs. Clark was the one juror who steadfastly voted for Foshay's acquittal. The sole issue before this Court (having any relevance to the issue in the present case) was the admissibility of Mrs. Clark's conduct as a juror in the Foshay trial and the manner in which she held out for Foshay's acquittal throughout the

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ments on motions to set aside the verdicts (see R. 2122). Even at that stage of the proceedings, moreover, it is clear that this argument was so blended and confused with the distinct argument relating to the question's relevance in respect of the issue of Adams' memory and credibility that it was never adequately brought to the trial judge's attention.

jury's deliberations. The argument advanced in opposition to the admissibility of this evidence was, in the words of the Court (289 U. S. at 12-13), that "* * * the arguments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. * * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." But the Court, while conceding the "force of these considerations" (289 U. S. at 13), held that social policy dictated an *exception* to this basic rule where a juror in a given case became a juror by virtue of concealment of the truth at her *voir dire* examination. The Court said (289 U. S. at 14):

> The privilege [not to have one's conduct and vote as a juror disclosed] takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would

exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.[5]

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[5] *State* v. *Serpas*, 188 La. 1074 (1938), relied on by the dissenting judge below (R. 2276) and by petitioner Burton (Pet. 13), presented a situation just the converse of that of the *Clark* case. Serpas was charged with wilfully perjuring himself by denying, on *voir dire* examination, that he knew any member of the family of one Goodwin, on trial in a criminal case. In consequence of this denial, and being otherwise qualified, he was accepted as a juror for the Goodwin trial, which resulted in a hung jury, of whom eleven were for conviction, the twelfth refusing to participate in the deliberations. Serpas in fact did know a member of Goodwin's family, but claimed at his perjury trial that he had not known, at the time of Goodwin's trial, that the person he knew was related to Goodwin. To substantiate his claim of lack of wilfulness in denying being acquainted with any member of Goodwin's family, he offered to prove that he was one of the eleven who had voted to convict Goodwin, and not the recalcitrant juror. This offer of proof was rejected by the trial judge, but on appeal the ruling was reversed, largely on the authority of this Court's decision in the *Clark* case.

The *Serpas* decision was, we think, plainly correct, both for the reasons which dictated the result in the *Clark* case, *viz.*, an overriding social policy requiring, in the circumstances, relaxation of the rule that the way in which a juror votes may not be disclosed, and for the equally cogent reason that Serpas, by offering to show how he voted, waived his privilege against disclosure. But the *Serpas* issue, like the *Clark* issue, is manifestly distinct from that presented by the case at bar.

Thus, the *Clark* case is square authority for the propriety of the Government's evidence in this case that the juror LaBranche held out for Burton's acquittal throughout the jury's deliberations, and, indeed, it was because of defense counsel's awareness of the *Clark* holding that no objection was made at the instant trial to that evidence (see R. 546). But it is not authority, as petitioners and the dissenting judge below suppose (see R. 2276), for the further proposition that the defense was entitled to show, on cross-examination of the witness Adams, that jurors *other than LaBranche* also held out for Burton's acquittal. No such issue was before the Court in the *Clark* case. It is true that it appears in the *Clark* opinion (see 289 U.S. at 9; and for the lower courts' opinions in that case, see 61 F. 2d 695, 698; 1 F. Supp. 747, 750) that Mrs. Clark *alone* voted for acquittal, all eleven of the other jurors having been for conviction. But there was no question in the *Clark* case as to the propriety or impropriety of evidence as to how jurors other than Mrs. Clark had voted. It does not even appear by what means the 11-to-1 split among the jurors was ascertained. Moreover, the *Clark* case involved a contempt proceeding before a judge sitting without a jury (unlike the case at bar), and it may be that, because of that fact, rules of evidence were not insisted upon strictly. Consequently, the *Clark* case is not an authority for petitioners' present contention.

Rather, insofar as the *Clark* case is at all controlling on the present issue, it is adverse to petitioners' contention. For the Court in the *Clark* case acknowledged as a *general principle* that the conduct and votes of jurors are properly considered secret matters which may not be divulged, without express consent on the part of each juror involved, *except* when an overriding consideration of public policy (which was found to be present in the peculiar circumstances of that case, so far as the vote of Mrs. Clark was concerned) dictates a relaxation of this rule. But no such consideration is present in the case at bar. The present issue is governed by the general principle recognized in the *Clark* case, rather than by the exception carved out of that principle by that case.

Correctly interpreted, the *Clark* case stands for the twofold proposition that (1) jurors, in general, are privileged not to have their conduct and manner of voting disclosed without their express consent, but that (2), by way of exception, where a certain juror is on trial for his own misconduct in connection with his status as a juror, he may not rely on this privilege. In the instant case, if jurors other than LaBranche had also been on trial for misconduct, it would of course have been proper, under the *Clark* decision, to admit evidence as to how they voted. But, no juror other than LaBranche having been charged with misconduct, the trial judge correctly excluded the

line of questioning, in the cross-examination of Adams, designed to show how other jurors voted. The issue before the jury—so far as is immediately pertinent—was whether the juror LaBranche had been "bought." There was evidence that he had been. Corroborating that evidence was the unchallenged additional evidence that his vote was "responsive to the bribe" (289 U.S. at 14). The manner of voting of no other juror was in issue, the integrity of no other juror having been challenged by the Government. It was quite irrelevant, therefore, to any issue at the trial how any other juror voted. Even if, as is now claimed, the defense could have proved, through cross-examination of the witness Adams, that seven other jurors had also voted for Burton's acquittal, that fact could have had no relevance, because their votes (unlike LaBranche's) were susceptible of no sinister interpretation. The situation here is closely parallel to that discussed in *United States* v. *Manton,* 107 F. 2d 834, 845-846 (C.A. 2) certiorari denied, 309 U.S. 664. It was there pointed out that the fact that the appeals in which Judge Manton participated might in fact have been "rightly decided," and that "the other judges who sat in the various cases" with Manton voted with him, was entirely irrelevant, because Manton's fellow judges "acted honestly and with pure motives," whereas Manton acted "for a price." Here, LaBranche would have been just as guilty

in the eyes of the jury, and rightly so, if the latter believed that seven other jurors voted honestly for Burton's acquittal, while he alone voted dishonestly, as if the jury believed that LaBranche was the only juror who voted for acquittal.

Furthermore, as we have pointed out (*supra*, p. 14), the defense was permitted to establish, in its cross-examination of Adams, that certain of LaBranche's fellow jurors changed their votes during the course of the deliberations. Thus, the jury in the instant case knew that at least at some stage or stages of the deliberations some of LaBranche's co-jurors also favored the acquittal of Burton. Consequently, the jury in the instant case were well aware that the evidence against Burton was not such that only a "bought" juror could possibly have held out for his acquittal. It is not true, therefore, as petitioners contend (Burton Pet 12; and see Cawthorn Pet. 20; LaBranche Pet. 21), that the jury below were "left to conclude" that LaBranche was the only juror in the tax-fraud trial that ever favored Burton's acquittal, and that they thus must inevitably have inferred that LaBranche's vote "must have been motivated by some factor other than the merits—the bribe allegedly paid him." On the contrary, the jury in this case was at no time under the impression that LaBranche and only LaBranche cast his vote for Burton's acquittal.

For the foregoing reasons, we submit, no error, and certainly no reversible error, was committed by

the trial judge in ruling out the attempted line of cross-examination.[6]

2. John Astorias, one of the alleged but unindicted co-conspirators, was a prosecution witness at petitioners' trial. He had previously appeared three times before the grand jury which indicted petitioners, and had also made a statement to Treasury agents. The transcript of his grand jury testimony and of his statement to the Treasury agents covered, in all, some 77 printed pages (see R. 2197). With the object of discrediting Astorias' testimony at the trial by eliciting from him admissions that he had previously given conflicting statements to the grand jury and to the Treasury agents, defense counsel asked leave of court to examine Astorias' earlier statements for cross-examination

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[6] Additionally, it should be pointed out that, assuming—for argument's sake only—that the defense was entitled further to show that jurors other than LaBranche also voted for Burton's acquittal, the mode of proving this fact which the defense attempted was improper. The proper course would have been to call, as defense witnesses, the various jurors who sat in the tax case and to ask each how he voted. Each juror could then have claimed or waived, as he saw fit, his privilege not to disclose his manner of voting. Instead, the defense attempted to establish that other jurors voted for Burton's acquittal by cross-examination of Adams. This was improper for the twofold reason that (1) Adams had no right to waive the personal privilege of each of the other jurors against disclosure of his vote, and (2) this line of interrogation was beyond the scope of the direct examination, and hence improper under familiar principles, since Adams had been asked on direct solely how LaBranche had voted. In short, proof that jurors other than LaBranche had also voted "not guilty," if competent at all (which we deny), was properly a part of the defense's affirmative case, and hence not properly adducible by cross-examination of the government witness Adams.

purposes (R. 687-688, 694-695, 1356). The request was granted, and defense counsel were given all the time they needed to examine Astorias' earlier statements—considerably more time, in fact, than was asked for (R. 1356). On cross-examination, Astorias was confronted with four selected excerpts from the transcripts of his earlier statements, which the defense maintained conflicted with his trial testimony; he readily admitted having made the earlier statements with which he was confronted, and this concluded his cross-examination (R. 696-698). Shortly thereafter, the Government rested its case (R. 703), and Astorias returned to his home in Gulfport, Mississippi.

Near the end of the trial, the defense offered in evidence the entire transcripts of Astorias' prior statements to the grand jury and Treasury agents, as defense exhibits (Burton) 1, 2, 3, and 4 (R. 1347-1348), for the announced purpose of showing "the state of mind of the witness and his motive in testifying, * * * and for the further purpose of impeaching the witness" (R. 1356). As later more fully articulated, the purpose of the offer was "to show that the witness testified as a result of fear, and under duress, hence has an interest and a motive, and is biased" (R. 1797). The Government objected to the offer, and its objection was sustained on the ground that "it is a well settled principle that a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize

with the statements made by him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstances, so that he can deny or explain them" (R. 1355). Numerous decisions were cited by the trial judge in support of his ruling (R. 1356-1357).

Petitioners now renew their argument, which was unanimously rejected by the Court of Appeals (R. 2197-2198), that it was error to exclude the proffered transcripts (Burton Pet. 15-24; Cawthorn Pet. 22-25; LaBranche Pet. 24-29). The trial court's ruling was, however, in full accord with the well established principle stated in *The Charles Morgan,* 115 U. S. 69, 77, that "contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." The ruling likewise accorded with the other decisions cited by the trial judge to the same effect (see R. 1356-1357). See also *Arnstein* v. *United States,* 296 Fed. 946, 950 (C.A. D.C.), certiorari denied, 264 U. S. 595.

Clearly distinguishing the instant case from the decisions cited by petitioners, including those indicating that evidence of bias is admissible without the requirement of laying a foundation (see Burton

Pet. 27; Cawthorn Pet. 25; LaBranche Pet. 27), is the fact that defense counsel were given two hours, though only one was requested, in which to examine Astorias' earlier statements before probing the witness in respect of prior inconsistent statements and bias (R. 1356); yet, as we have indicated, he was questioned in regard to only four selected excerpts from the entire transcripts of his earlier statements.

Petitioners assert that much evidence contained in the excluded documents showed that the prosecutor and the grand jurors accused Astorias of perjury (see Burton Pet. 19; Cawthorn Pet. 24; LaBranche Pet. 28-29), and that the jury should have been allowed to hear this to show Astorias' self-interest and bias in testifying for the Government. However, on his cross-examination, Astorias admitted he had committed perjury (R. 676), so that the jury were fully aware of that fact in weighing the credibility of his testimony. Petitioners also argue that the Court of Appeals was wrong in stating that "there was * * * already in evidence without contradiction all that these lengthy documents would tend to show" (R. 2198) regarding Astorias' fear of prosecution for not having paid his income taxes. They point out that Astorias denied on cross-examination that he feared being indicted for income tax evasion (R. 664, 666), whereas the excluded documents would have shown that he was apprehensive of indictment (see Burton Pet. 20-21;

Cawthorn Pet. 23; LaBranche Pet. 28). But Astorias admitted on cross-examination that he knew the Treasury agents were investigating his affairs (R. 657); that he went before the grand jury about three months after the federal agents learned of the existence of $19,000 in a safety deposit box upon which he had not paid income taxes (R. 662); and that he was "scared [he] was going to be mixed up in something" and that he never mixed up in anything (R. 664). Thus, the jury were thoroughly apprised, from Astorias' own testimony, of his fears arising from his income tax difficulties, and the evidence to that effect contained in the excluded documents could consequently have had no more than cumulative effect.

Petitioners rely upon *United States* v. *Krulewitch,* 145 F. 2d 76 (C.A. 2) (see Burton Pet. 22-23; LaBranche Pet. 27), as conflicting with the Court of Appeals' decision in this respect. However, the situations in the two cases are entirely different. In the *Krulewitch* case, the trial judge, after examining a prior statement given to the F.B.I. by a government witness to ascertain if the statement contradicted the witness' testimony, refused to permit the defendant's counsel to inspect the document and sealed it as part of the record; here, as we have shown, the trial judge gave defense counsel ample time in which to examine the transcripts of Astorias' earlier statements and freely permitted counsel to use the transcripts for cross-

examination purposes. The very basis of the *Krulewitch* holding was that, because of the refusal to permit inspection of the witness' earlier statement, it had been impossible for the defense to lay the proper foundation for the introduction of the statement in evidence in the event the witness denied having made it (145 F. 2d at 79).

3. Petitioners maintain that the trial court's use of the *Allen* instruction (based on *Allen* v. *United States,* 164 U. S. 492, 501), as a supplemental charge, had a coercive effect upon the jury and deprived petitioners of a fair trial (Burton Pet. 24-28; Cawthorn Pet. 21-22; LaBranche Pet. 29-31). The contention is clearly insubstantial.

On Saturday morning, May 15, 1948, the case was submitted to the jury (R. 283, 284). At noon on the following day, the court informed the jury that they had been out 25 hours and was told they could not agree on a verdict (R. 1453-1454). The court thereupon gave the jury a supplemental charge (R. 1454-1455) in the exact language of an instruction approved by the Massachusetts Supreme Court in *Commonwealth* v. *Tuey,* 8 Cush. 1, and by this Court in *Allen* v. *United States,* 164 U. S. 492, 501.[7] Upon completion of this supplemental charge, the court asked if there were any exceptions and counsel for

[7] Petitioner Burton's statement (Burton Pet. 26) that the quoted portion of the instruction was an "additional" instruction, which he proceeds to criticize, is not correct because this was a *verbatim* part of the instruction taken from the *Tuey* case.

petitioners made no objections (R. 1455).[8] It was not until May 18, two days later, at about 11:00 a.m., that the jury returned their verdict (R. 286, 287).[9]

In these circumstances, it seems obvious that the court's supplemental charge did not coerce the jury in arriving at their verdict, not agreed upon until about 48 hours later. If there had been any degree of coercion, the verdict would certainly have been reached much sooner.[10] In any event, since the supplemental charge here given was one expressly approved by this Court in the *Allen* case, it was manifestly proper for the trial court to give it.

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[8] *Brasfield* v. *United States*, 272 U.S. 448, is cited (Cawthorn Pet. 22) for the proposition that the fact that no exceptions were taken to the supplemental instructions does not preclude this Court from correcting a manifest error. The *Brasfield* case, however, was not concerned with any question of supplemental instructions. It held only that it was reversible error for a trial judge to ask a disagreeing jury how they were divided.

[9] Petitioners' statement (Burton Pet. 24; LaBranche Pet. 29-30) that after the giving of the supplemental charge the jury was locked up and held *incommunicado* for 48 hours is incorrect and misleading. On each night the jurors had comfortable rooms in the St. Charles Hotel, and the trial judge was at all times available if the jury had questions.

[10] In *Peterson* v. *United States*, 213 Fed. 920 (C.A. 9), relied on by petitioner Burton (Pet. 27), the supplemental charge was "plainly coercive" in stating that "the government has a right to a verdict without further expenditure of time and money" (213 Fed. at 924) and the jury returned with a verdict in less than an hour (213 Fed. at 926). And in *Edwards* v. *United States*, 7 F. 2d 598, 600 (C.A. 8), relied on by petitioner LaBranche (Pet. 30), the charge contained coercive language not used in the instant case, and the coercive effect was evident from the fact that the jury returned a verdict almost immediately after the giving of the supplemental charge.

Weathers v. *United States*, 126 F. 2d 118, 120 (C.A. 5), certiorari denied, 316 U. S. 681; see also *Hyde* v. *United States*, 225 U. S. 347, 381-383; *United States* v. *King*, 162 F. 2d 594, 596 (C.A. 2).[11]

4. Petitioners contend (Burton Pet. 28-32; Cawthorn Pet. 26; LaBranche Pet. 17-20) that the indictment is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.*, to commit an offense against the United States ("corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a federal court by bribing a juror, in violation of Section 135 of the Criminal Code, *supra*, p. 3) and "to defraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax evasion case] through the petit jury * * * free from corruption," etc. Similar contentions have been rejected as often as they have been advanced. It has long been settled that a conspiracy indictment or count of this type, where the objective statutory violation bears an obvious relation to the defrauding of the United States with which it is linked as an object of the conspiracy, is not objectionable for duplicity. *May* v. *United States*, 175 F. 2d 994, 1002 (C.A. D.C.), certiorari

[11] *Burton* v. *United States*, 196 U.S. 283, cited by petitioners (Burton Pet. 26-27; Cawthorn Pet. 22; LaBranche Pet. 31), did not hold there was any error in giving the *Allen* charge, but that it was error to refuse the defendant's request that the court instruct the jury that those requests to charge which had been allowed were as much a part of the charge as the instructions read by the court as emanating from itself. 196 U.S. at 306.

denied October 10, 1949, Nos. 100-102, this Term; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U. S. 664. Moreover, "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U. S. 204, 209-210; *Braverman* v. *United States*, 317 U. S. 49, 54; *Pinkerton* v. *United States*, 328 U. S. 640, 642-643.[12]

5. Finally, petitioner LaBranche argues that since the indictment charged, and the evidence showed, a conspiracy merely to give and receive

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[12] Petitioners' related contention—that their offense, if any, consisted of violating Section 136 of the Criminal Code, *supra*, p. 4 (the special conspiracy statute dealing with conspiracies to influence jury verdicts) rather than Section 37, *supra*, p. 3 (the general conspiracy statute providing for the punishment of any conspiracy to commit an offense against the United States or to defraud the United States)—is, we think, adequately disposed of by the court below (see R. 2193-2194), which was unanimous on this point. "Section 136 and Section 37 may overlap," as the court below observed (R. 2193), "but neither was intended to repeal or supersede the other." Petitioners, in any event, can scarcely complain of having been prejudiced by being prosecuted under Section 37 rather than Section 136, since the maximum prison sentence imposable under the latter section was thrice the two-year maximum fixed by the former (though a lower maximum fine ($5,000) was fixed by Section 136 than by Section 37 ($10,000)).

There is no conflict, as claimed by petitioners (Burton Pet. 32; Cawthorn Pet. 26), between the decision below and *Enfield* v. *United States*, 261 Fed. 141 (C.A. 8). In the latter case, it was concluded, from the *express language* of Section 4 of the Espionage Act of 1917, 40 Stat. 219 (providing the same penalty for conspiring to violate either § 2 or § 3 of that Act as was fixed by the particular section whose violation was contemplated by the conspiracy, but providing that conspiracies to violate any other section of the Act should be punished under the general conspiracy statute, *i.e.*, Criminal Code, § 37), that "this section [*i.e.*, § 4 of the Espionage Act] was expressly intended to replace section 37 [of the Criminal Code] in those cases to which it is applicable" (261 Fed. at 142).

a bribe and actual commission of the substantive offense, the indictment should have been dismissed as to him (LaBranche Pet. 8-17). The contention is clearly without merit.

The indictment does not charge the substantive offense of giving or receiving bribes nor a conspiracy to give or accept bribes, but rather, in the language of the analogous *Manton* case, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664, "a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." Cf. *Glasser* v. *United States*, 315 U.S. 60, 66-67.

The mere fact that the bribery of LaBranche was consummated, as shown by the evidence, did not serve to merge the conspiracy with the accomplished crime of bribery. *Pinkerton* v. *United States*, 328 U.S. 640, 644. A similar contention was squarely rejected in the jury tampering case of *Sneed* v. *United States*, 298 Fed. 911, 913 (C.A. 5), certiorari denied, 265 U.S. 590, which was cited with approval on this point in the *Pinkerton* case.[13]

[13] In the *Pinkerton* case, the Court stated: "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States*, *supra*, p. 913. 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

United States v. *Zeuli*, 137 F. 2d 845 (C.A. 2), cited as being in conflict with the decision below, is clearly distinguishable. The conspiracy there charged was a conspiracy to steal gasoline ration books and convert them, knowing their stolen character. The defendant's conviction was reversed because, though he knew the ration books were stolen, there was no evidence connecting him with the theft. Here, on the other hand, the evidence showed that LaBranche discussed the conspiracy and contemplated bribery with Oliveira even before he was accepted as a juror (R. 559), negotiated with Cawthorn through Oliveira in fixing the amount of the bribe (R. 563), knew that Burton had authorized the bribe and its amount (R. 566), and actually received the bribe money (R. 573). Plainly, LaBranche was intimately connected with, and a member of, the conspiracy from the outset. Also inapposite here is *United States* v. *Dietrich*, 126 Fed. 664 (C. C. D. Neb.), another case relied on by LaBranche (Pet. 11). There the agreement to give and receive the bribe was between two persons only, the giver and the receiver, and this point was the crux of the decision that, this agreement being of the essence of the substantive offense of bribery, it could not be made the basis for a conspiracy charge.[14] Here,

[14] See *United States* v. *Glasser*, 116 F. 2d 690, 696 (C.A. 7), affirmed in part (on this point, 315 U.S. at 67) and reversed in part, 315 U.S. 60, holding the *Dietrich* case not in point as authority for the same contention as is here made by petitioner LaBranche.

however, the conspiracy was to obstruct the administration of justice and defraud the United States of its right to an honest and unbiased jury, and LaBranche was but one member, though a key one, of the conspiracy, which also included, at least, Burton, Cawthorn, Oliveira, and Astorias.

CONCLUSION

The judgment below is correct, and there is no real conflict of decisions. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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